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No. .....

IN THE

Supreme Court of the United States

October Term, 1982

MARSHALL FIELD & COMPANY,

Petitioner,

vs.

RAYMOND ALLEN, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Questions Presented for Review.

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, incorporates the enforcement provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). The questions presented for review are:

1. Does a United States District Court have the power to order the sending of notice to potential plaintiffs to solicit their consent to join in an ADEA action brought pursuant to the enforcement provisions of the FLSA notwithstanding the fact that: (i) those enforcement procedures do not authorize notice; and (ii) there is compelling legislative intent that there be no notice?

2. Assuming that a United States District Court is without power to compel the sending of notice, what relief is appropriate with respect to persons who joined the age discrimination action as a result of an improper court-ordered notice to potential plaintiffs?

Parties to Action.

The petitioner is Marshall Field & Company, defendant in the action in district court. The respondents include the original four named plaintiffs, Raymond Allen, Peter Bosman, Carol E. Bunn, and Karl C. Kaiser, and an additional 64 persons who filed consents to become plaintiffs as a result of a court-authorized notice. A complete listing of the names of all respondents is contained in the Appendix.

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Opinions Below.

The unreported opinion of the Court of Appeals for the Seventh Circuit, rendered on September 22, 1982, is attached in the Appendix. The March 25, 1982 Minute Order of the District Court for the Northern District of Illinois, from which Petitioner Marshall Field & Company appealed to the Seventh Circuit, is also attached in the Appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 22, 1982. This petition for a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provision Involved.

The statutory provision involved in this petition is Section 16(b) of the Fair Labor Standards Act, which provides in relevant part that:

> "An action to recover [damages] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves or other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b).

Statement of the Case.

On October 16, 1981, four plaintiffs (Allen, Bosman, Bunn, and Kaiser) brought this age discrimination action against Petitioner Marshall Field & Company (the "Company"), invoking the district court's jurisdiction under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq*. The Complaint was brought "on behalf of themselves and on behalf of others similarly situated," pursuant to Section 7(b) of the ADEA (29 U.S.C. § 626(b)) and Section 16(b) (29 U.S.C. § 216(b)) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq*.

On December 15, 1981, Respondents filed a Motion to Send Notice to Persons Who May Have Been Discriminated Against by Marshall Field Because of Their Age. The Company filed written opposition to this Motion.

On January 21, 1982, the district court:

(1) ordered the Company to provide Respondents with the names and addresses of all current and former executives of its Chicago Division who, since January

1, 1977, were discharged, demoted, transferred, or forced into early retirement;

(2) ordered that a notice be sent to such persons on or before February 5, 1982;

(3) determined that consents to join the action from such persons, which were mailed to the clerk of the court and postmarked on or before March 1, 1982, would be considered timely filed;

(4) approved the Respondents' proposed notice; and

(5) denied the Company's request to certify its order for appeal pursuant to 28 U.S.C. § 1292(b). (*See* Minute Orders dated January 21, 1982, and January 27, 1982).

The court prepared a Memorandum Opinion on the notice question, which was filed on January 27, 1982.

As ordered, the Company provided Respondents the names and addresses of 157 persons, and Respondents sent notice to these individuals on or about January 29, 1982. Thereafter, notices were mailed to an additional 63 persons.

Prior to the time the notice was sent, *not one individual had filed a written consent to join the named plaintiffs as a party plaintiff in this action.* After the notice was mailed to potential plaintiffs, however, consents were returned to the designated post office box by over 60 individuals.

On March 19, 1982, shortly before the last day on which the last-notified group of potential plaintiffs could join the action, the Company filed a Motion to Strike Consents and to Dismiss Those Persons Filing Consents From This Action ("Motion to Strike Consents and to Dismiss").[1]

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[1]The Company's Motion to Strike Consents and to Dismiss was supported by a detailed Memorandum of Points and Authorities on the issues of notice and solicitation, and by numerous affidavits attesting to a flagrant campaign of publicity and solicitation engaged in by the named plaintiffs in an effort to obtain consents from current and former employees. The Company's motion was made on the ground that each of the filed consents was invalid and ineffective since each was the tainted result of improper notice to, and solicitation of, potential plaintiffs. Concurrently, the Company filed a Motion for Certification for Appeal and a Stay of the present action ("Motion for Certification and a Stay").

The Company's Motion to Strike Consents and to Dismiss and its Motion for Certification and a Stay were denied by the district court on March 25, 1982. (*See* Minute Order dated March 25, 1982, Appendix). On April 22, 1982, the Company timely filed in the district court a Notice of Appeal from the Minute Order of March 25, 1982.[2]

The Court of Appeals for the Seventh Circuit took jurisdiction of the appeal pursuant to the collateral order doctrine as recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). On September 22, 1982, the Court of Appeals affirmed the district court's order that notice can be sent.

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[2]On May 3, 1982, the Company filed a Petition for Writ of Mandamus with the Court of Appeals for the Seventh Circuit, requesting the Court to issue a writ directing the district court to strike the consents and to dismiss those filing consents. This Petition was accompanied by numerous Exhibits which were considered by the Seventh Circuit in deciding both the Appeal and the Petition. The Seventh Circuit denied the Petition for Writ of Mandamus on May 27, 1982.

REASONS FOR GRANTING THE WRIT.

Petitioner asks this Honorable Court to consider an important legal question about which the United States Court of Appeals for the Ninth Circuit and the Second and Seventh Circuits have reached opposite results, and upon which the United States Supreme Court has not ruled. The Ninth Circuit has twice held that a court does not have the power to authorize notice to potential claimants in an action brought under Section 16(b) of the FLSA. The Second and Seventh Circuits have ruled otherwise.

In addition, the significance of this important legal question clearly warrants consideration by this Honorable Court in light of the proliferation of age discrimination litigation in the United States District Courts.

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Power of a Court to Order Notice to Potential Claimants in an Action Brought Pursuant to the FLSA.

The Ninth Circuit in *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977) reversed the order of the district court which permitted the two named plaintiffs to send out a notice to potential plaintiffs in an action under Section 16(b) of the FLSA. The court's reversal was premised on the following reasons:

> (1) Section 16(b) does not provide for notice procedures;
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> (2) In a FLSA "class action" under Section 16(b) the res judicata effect applies only to the named parties and to those persons who affirmatively "opt-in" to the action. The reason for notice under Rule 23 of the Federal Rules of Civil Procedure is to provide due process without which a judgment might not be binding on class members. Thus, due process considerations

which require notice in a class action under Rule 23 are *not* present in a Section 16(b) action which does not bind nonconsenting class members;

(3) Congress was well aware of the differences between the procedures under Rule 23 and those under Section 16(b) when it adopted the FLSA enforcement provisions for ADEA actions. The adoption of a Rule 23-type notice to facilitate the opting-in of potential class members is contrary to the congressional intent in rejecting Rule 23 procedures; and

(4) The court should avoid the involvement of either plaintiff or the court in stirring up litigation and the solicitation of claims. Even under Rule 23, the reason for notice is not to stir up claims but rather is to provide due process to class members.

The Ninth Circuit reaffirmed this holding in *Partlow v. Jewish Orphans' Home*, 645 F.2d 757 (9th Cir. 1981). Plaintiffs' counsel in *Partlow* had solicited potential plaintiffs to join the pending action and sixty-nine employees then filed "consents." The Ninth Circuit stated that:

> "*Kinney* makes clear that under the law of this circuit, named plaintiffs' counsel had no power to solicit the class members. *Id.* The district court quite properly found that the resulting 'consents' were ineffective." 645 F.2d at 759.

The Second Circuit, however, concluded that Section 16(b) permits notice "in an appropriate case." *Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335 (2nd Cir. 1978). The Seventh Circuit chose to follow the *Braunstein* decision in *Woods v. New York Life Insurance Co.*, 686 F.2d 578 (7th Cir. 1982), and in the present action. It held in this action that the court has the "power to authorize notice by the plaintiff or his counsel to members of the class." (Appendix).

These decisions are contrary to the congressional intent, in Section 16(b) actions, to afford "a statutory class action 'independent of and unrelated to the class action covered by Rule 23.' . . ." *Kinney* at 862. Congress considered, but rejected, proposals to model the ADEA enforcement provisions after Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*), which permit class actions under Rule 23. *Lorillard v. Pons*, 434 U.S. 575, 578 (1978).[3] Congress intended to use the existing scheme of the FLSA which does not provide for notice. *Id.* at 578, 580.

In making the choice to incorporate into the ADEA the enforcement provisions of the FLSA, including the consent filing provision, it was the clear intent of Congress to adopt procedures that "afford more expeditious and individual treatment of claims of age discrimination than those afforded by either the National Labor Relations Act or Title VII." *Naton v. Bank of California*, 72 F.R.D. 550, 555 (N.D. Cal. 1976). Adoption of a Rule 23-type notice would be contrary to the congressional intent to reject Rule 23 procedures.

This congressional intent was reinforced when Congress amended the ADEA in 1978 (The Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256, 92 Stats. 189). At the time of the amendments, *Kinney*, but not *Braunstein*, had been decided. Congress did not add any authority for notice nor did it indicate its disagreement with the *Kinney* decision prohibiting notice, even though it explicitly disagreed with judicial decisions interpreting

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[3]Senator Javits, the chief proponent of the adoption of the FLSA enforcement procedures, stated that the more restrictive requirements of Section 16(b) were "best adapted to carry out [the] age-discrimination-in-employment ban *with the least overanxiety or difficulty on the part of American business*. . . . [T]his is one of the most important aspects of the bill." 113 Cong. Rec. 31254 (1967) (*emphasis added*).

other procedural provisions of the ADEA. *See* S. Rep. No. 95-493, 95th Cong., 2d Sess. 12-13 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News, Vol. 3, 515-516. As noted in *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979) and in *Lorillard, supra* at 581-82, Congress is presumed to have been aware of the judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without changes. Congress thus approved of the *Kinney* decision prohibiting notice.

The history of Section 16(b) also demonstrates the congressional intent to limit the number of plaintiffs and the size of actions brought pursuant to Section 16(b). The consent filing provision was added in 1947 in response to the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In *Anderson*, the Court held that employees were entitled to be paid for the time spent in in-plant activities both before and after the actual performance of their work. The recognition by both government and private industry of the potentially huge liability that could have arisen from broad-based *Anderson* actions under the FLSA resulted in the enactment of the consent filing provision, and the simultaneous elimination of Section 16(b)'s provision allowing "agent or representative" actions. *See LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 287 n. 6 (5th Cir. 1975).

Courts which have approved of notice in Section 16(b) actions have argued that notice will avoid a multiplicity of actions. This argument is incorrect. First, Congress rejected broad-based actions enlarged by notice; rather, it sought "more expeditious and individual treatment" of age discrimination claims. *Naton, supra* at 550. Second, as noted in *Baker v. The Michie Co.*, 25 WH Cases 368 (W.D.Va. 1982), it may well be in the best interests of notified, potential plaintiffs not to join the pending action, but "rather

to allow other plaintiffs to bear the burden of the initial litigation and then to file suit if the prospects of success appear favorable," 25 WH Cases at 371. Thus, notice cannot be justified on this ground.

If courts authorize or permit notice in ADEA actions, they disrupt the delicate balancing of interests that was struck by Congress when it adopted Section 16(b) of the FLSA as part of the ADEA enforcement scheme. Such action usurps the legislative prerogative and results in broad-based ADEA actions neither contemplated by Congress, nor bounded by the procedural safeguards of Rule 23.[4]

2. This Unsettled Issue of the Power of a Court to Order Notice to Potential Claimants Has Significant Impact on the Many Pending ADEA Actions.

The number of cases brought under the ADEA has increased dramatically in the last few years. Lawsuits are currently pending against major employers such as Consolidated Edison, Equitable Life, Federated Department Stores, Dayton Hudson, Chrysler, TWA, NBC, Northern States Power, Rockwell International, and General Motors. (*Dun's Business Month*, "Big Surge in Age Bias Suits", September 1982, page 56). In 1980, EEOC chief Eleanor Holmes Norton predicted that the EEOC will see "extraordinary growth" in age discrimination cases over the next few years. (*U.S. News and World Report*, "Trends in

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[4]Rule 23's requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the Rule's practices and provisions relating to certification, decertification, maintainability, notice, and settlement, all serve to ensure that broad-based Title VII class actions are litigated in a fair and efficient manner. Section 16(b), however, is wholly devoid of any such provisions or practices. This is because, both at the time the ADEA was enacted, and today, Rule 23-type provisions and practices are wholly unnecessary and inappropriate in Section 16(b) cases, given the limited nature of the actions that Congress contemplated would be maintained pursuant to that provision.

Labor", July 7, 1980, page 72). The EEOC reported that 13,164 charges of age discrimination were filed during fiscal year 1981. (EEOC, *Annual Report for Fiscal Year 1981*, Appendix 1, p. 2). In fiscal year 1976, the Department of Labor, which previously administered the ADEA, investigated approximately 6,630 charges. (U.S. Dept. of Labor, Emp. Stds. Adm., *Age Discrimination in Employment Act of 1976: A Report Covering Activities Under the Act During 1976*, p. 9).

Permitting notice to potential claimants in these age actions may increase the complexity and decrease the manageability of each action. Unlike the Rule 23 requirement that class members must have common claims, Section 16(b) requires that opt-in plaintiffs be "similarly situated."[5] Where the only similarity among the plaintiffs is the general claim of age discrimination, the action may include plaintiffs who allege disparate treatment because of age due to demotion, transfer, discharge or forced early retirement at various locations by different executives. The heart of such a case focuses on each individual's performance in individual situations. No employer practice applicable to each plaintiff is involved, as would be required in a Rule 23 proceeding.

The instant case illustrates the complexity and unmanageability that results from the joinder of plaintiffs as a result of the notice such as that given here. Far from having common claims, plaintiffs' purported claims arose in widely-scattered locations, while plaintiffs held positions at widely-varying corporate levels. Some plaintiffs remain

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[5]The procedure of Section 16(b) was originally adopted for cases involving claims of minimum wage and overtime violations. The factual and legal questions usually involved pay practices that were equally applicable to each plaintiff.

employed by defendant, while others were terminated, voluntarily chose to leave defendant, or allege that they were "forced" to take early retirement. Serious conflicts of interest also exist between some plaintiffs. (*E.g.*, consenting plaintiff Shaw was the immediate supervisor of, and one of the individuals who participated in the decision to terminate, named plaintiffs Allen and Bosman.) Thus, notice has resulted in a situation where the jury or juries will literally have to decide over 60 factually unique cases.[6] This procedure is contrary to the congressional intent to have a "more expeditious and individual treatment" of age discrimination claims than Title VII claims. *Naton v. Bank of California, supra* at 555.

Conclusion.

The many pending ADEA actions will be greatly affected by the resolution of this issue of notice. Until this Court rules on this issue, some district courts will permit notice to potential claimants, thereby encouraging the joinder of divergent age claims which depend upon the particular facts of each individual's claims. District courts will be forced to devise elaborate procedures in order to try such individual claims all in one action. This result is contrary to the congressional intent in rejecting notice and does not comport with judicial efficiency.

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[6]The district court on September 30, 1982 authorized additional notices to potential plaintiffs. As a result of the latest notice, 13 new plaintiffs have filed consents in October 1982 to join the action set for trial on February 28, 1983.

A writ of certiorari should issue to review the judgment of the Seventh Circuit.

Respectfully submitted,

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